The really vital issue here, however, is whether an interim order in the nature that we have before us now should have been made at all. To resolve that we have to go back to basic principles.

The functions of the tribunal appointed under art 125(3) of the Constitution is to inquire and investigate on the representation and then report to the Yang di-Pertuan Agong with any recommendation it may make. The tribunal is a body which investigates and does not decide. It is performing a constitutional function. The tribunal should not therefore be restrained from performing its constitutional function.

Finally, the members of the tribunal are appointees of the Yang di-Pertuan Agong. From the language of art 125 it is clear that the Yang di-Pertuan Agong is entittled to the report of the tribunal. To restrain the tribunal from submitting their report is in effect to restrain His Majesty from receiving the report.

On the above grounds it is our view that the restraining order is therefore bad in law, invalid and unenforceable as against the Yang di-Pertuan Agong and the tribunal.

Order accordingly.

Solicitors: *Shook Lin & Bok*; *Shearu Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*

Appendix

Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors

SUPREME COURT (KUALA LUMPUR) – CIVIL APPLICATION NO 26 OF 1988
WAN SULEIMAN, SEAH, MOHAMED AZMI, ABDOOLCADER AND WAN HAMZAH SCJJ
2 JULY 1988

ORDER

This ex parte notice of motion coming on for disposal this day in the presence of Raja Aziz Addruse of counsel for the appellant applicant *and upon hearing* counsel as aforesaid *it is ordered* that the tribunal appointed under art 125(3) of the Federal Constitution be restrained from submitting any recommendations report or advice respecting the enquiry into the matter of the applicant Tun Dato Haji Mohamed Salleh bin Abas to His Majesty the Yang Di-Pertuan Agong until further order.

Given under my hand and the seal of the court this 2nd day of July 1988.

Tan Sri Datuk Wan Suleiman bin Pawan Teh
Supreme Court Judge
Supreme Court, Malaysia
Kuala Lumpur

Lim Yak Hua v Eastern & Oriental Hotel (1951) Sdn Bhd

HIGH COURT (PENANG) – CIVIL SUIT NO 23-7-87
EDGAR JOSEPH JR J
14 JULY 1988

Contract – Deposit paid under contract of sale and purchase – Non-completion of contract – Return of deposit – Interest – Date from which interest to be calculated

In this case, the plaintiff had agreed to purchase an apartment in a multi-storey block and had paid the total sum of $183,900 towards the purchase price. The construction of the building could not be proceeded with due to substructural failure. The plaintiff claimed the return of deposit and interest thereon. It was agreed by the defendant that interest was payable at the rate of 8% pa from the date of accrual of action, that is, 1 January 1986 until date of judgment and thereafter interest at the same rate until realization. The plaintiff contended that interest at the rate of 8% was also payable from the date of each of the payments of the deposit to the date of judgment and thereafter interest at the same rate on the aggregate of such sums until realization. The dispute was thus limited to the sole question: What is the pre-judgment period in respect of which interest at the agreed rate of 8% was payable?

Held: (1) The principle underlying the award of interest is not to compensate a plaintiff for any damage done, but for him being kept out of his money.

(2) In an action for recovery of the deposit paid under a contract of sale and purchase, the court has a discretion as to whether or not to allow interest and from what date it should be calculated. Where the non-completion is the fault of the vendor and such fault existed at the date of the contract, as for example, not having any title, interest will be allowed from the date of payment as a rule.

(3) In this case the defendant had accepted the opinion of their experts as to the substructural failure most probably on 1 July 1983. The defendant, however, did not inform the plaintiff of this until 16 October 1984 and was therefore guilty of inordinate delay and so to this extent was at fault.

(4) In the exercise of the court's discretion, interest would be awarded at the agreed rate of 8% pa on the aggregate of the sums deposited from 1 July 1983 until date of judgment and thereafter pursuant to O 42 r 12 of the Rules of the High Court 1980 at the same rate until realization.

Cases referred to

1 *The London, Chatham & Dover Railway* v *The South Eastern Railway Co* [1893] AC 429 (folld)
2 *Murtadza bin Mohamed Hassan* v *Chong Swee Pian* [1980] 1 MLJ 216 (refd)
3 *Macdonald* v *Marson* (1913) 33 NZLR 248; 16 NZGLR 330 (refd)
4 *Re Hargreaves & Thompson's Contract* (1886) 32 Ch D 454 (refd)
5 *Turner* v *Marriott* (1867) LR 3 Eq 744 (refd)
6 *Day* v *Singleton* (1899) 2 Ch 320 (refd)
7 *Carlish* v *Salt* [1906] 1 Ch 335 (refd)
8 *Re Bryant & Barningham's Contract* (1890) 44 Ch D 218 (refd)
9 *Weston* v *Savage* (1878-79) 10 Ch D 736 (refd)
10 *Skinner* v *James Syphonic Visible Measures Ltd* (1927) 28 SR NSW 20; 44 WN 156 refd)

11 *Power* v *Atkins* [1921] NZLR 763 (refd)
12 *Moss* v *Perpetual Trustees and Agency Co* [1921] NZLR 264 (refd)
13 *Re Bayley-Worthington and Cohen's Contract* [1909] 1 Ch 648 (refd)

Legislation referred to
Civil Law Act 1956 s 11
Rules of the High Court 1980 O 42 r 12

RJ Manecksha for the plaintiff.
Patrick YC Chen for the defendants.

Cur Adv Vult

Edgar Joseph Jr J: This is a summons for summary judgment under O 81 of the Rules of the High Court 1980 for refund of a sum of $183,900 being payment to account of the purchase price paid by the plaintiff purchaser to the defendant vendor under a sale and purchase agreement dated 20 February 1982 for an apartment in a multi-storey tower block known as 'E & O Puri', the construction of which could not be proceeded with due to substructural failure, and for interest thereon.

Before me, it was accepted by counsel for the defendant that the payments to account, the breakdown of which was as follows:

On 14 January 1981 – $53,000
On 20 February 1982 – $8,300
On 11 June 1982 – $61,300
On 20 October 1982 – $61,300

were refundable with interest thereon at the rate of 8% pa from date of accrual of cause of action, which it was said was 1 January 1986 until date of judgment, reliance being placed on s 11 of the Civil Law Act 1956, and, thereafter, interest at the same rate, until realization.

On the other hand, counsel for the plaintiff contended for interest at the rate of 8% pa on the four sums aforesaid from the date of each of such payments to the date of judgment and, thereafter, interest at the same rate on the aggregate of such sums until realization. The contest was thus limited to the sole question: What is the pre-judgment period in respect of which interest at the agreed rate of 8% pa was payable?

Before I embark upon a consideration of the issue which arises for decision it is necessary to set out, by way of background, certain plain facts which are not in dispute.

Following the execution of the sale and purchase agreement aforesaid, whereby the plaintiff had agreed to purchase the apartment at a price of $613,000 to be paid by instalments stipulated therein and the defendant had agreed to sell the same, undertaking to give vacant possession thereof not later than December 1985, the defendant was unable to complete the construction of the tower block which was to comprise the apartment, because the substructure thereof, constructed by its contractor, could not withstand the load of the main structure.

In consequence, there were negotiations for settlement as regards the rate of interest payable on the payments to account of the purchase price aforesaid and as to the date when interest should run, but unfortunately the parties were unable to agree on both these issues with the result that the action herein was commenced, followed shortly thereafter by the application for summary judgment.

So much for the background to the case. I must now revert to the issue which arises for decision.

Now the principle underlying the award of interest is not to compensate a plaintiff for any damage done, but for him being kept out of his money: see *The London, Chatham & Dover Railway Co* v *The South Eastern Railway Co*[1] at p 437.

As for the question what rate of interest the court should award in respect of the pre-judgment period, no issue arises since, as I have already noted, the parties had agreed on a rate of 8%, although during the negotiations for settlement, there was a conflict as to this. Nevertheless, I would remark, in passing, that several different rates may be given regard being had to the circumstances of each case, the more obvious ones being as follows:

(a) the judgment debt rate, that is to say, the rate payable under O 42 r 12 of the Rules of the High Court 1980;
(b) short term investment account rate;
(c) the commercial rate, meaning how much did the plaintiff have to pay on borrowing the money or would have to pay had he borrowed the money;
(d) the investment rate, meaning how much his return would have been had the plaintiff invested the money;
(e) the foreign investment rate, meaning the going rate of interest of the country in whose currency the judgment is given.

I now pass on to consider the sole question for decision in this case which, as I have already said, what is the pre-judgment period for which interest at the agreed rate of 8% pa should be paid, in the particular circumstances of this case?

There is authority for saying that in the case of personal injury claims, interest on general damages for pain and suffering is normally awarded from the date of service of the writ and, on special damages, from date of accident (see, for example, *Murtadza bin Mohamed Hassan* v *Chong Swee Pian*[2]), whilst in the case of economic loss claims, it is from the date of the loss or the date on which the cause of action accrued.

In an action for recovery of the deposit paid under a contract of sale and purchase the court has a discretion as to whether or not to allow interest, and from what date it should be calculated. Where the non-completion is the fault of the vendor, and such fault existed at the date of the contract, as for example, not having any title, interest will be allowed from the date of payment as a rule. It is not difficult to cite an anthology of cases in support of this proposition. My choice of cases is as follows: *Macdonald* v *Marson*,[3] *Re Hargreaves & Thompson's Contract*,[4] *Turner* v *Marriott*[5] (good title not deduced); *Day* v *Singleton*[6] (vendor unable to procure lessor's consent to assignment of lease), *Carlish* v *Salt*[7] (vendor failing to disclose a party wall notice prior to contract), *Re Bryant & Barningham's Contract*[8] (trustees without an immediate power of sale), *Weston* v *Savage*[9] (title defective), *Skinner* v *James Syphonic Visible Measures Ltd*[10] and *Power* v *Atkins*[11] (misrepresentation by vendor).

However, if the circumstances warrant it, interest may be allowed only from the date of the purchaser's repudiation of the contract: *Moss* v *Perpetual Trustees and Agency Co.*[12]

Now, clearly, taking a wrong view of the law, even if reasonably held, constitutes a default: see *Re Bayley-Worthington and Cohen's Contract.*[13] So, perhaps, understandably in the present case, there was no dispute that non-completion was due to the fault of the defendant. But when did this fault first exist? The answer to this question must be when the defendant first became aware as a result of the opinion of their experts that the existing substructure was substantially not in accordance with the contractual specifications and could not therefore be retained without considerable risk to the proposed superstructure. It was agreed by counsel that the defendant had accepted the opinion of their experts most probably on 1 July 1983.

It is my view, therefore, that at the latest, this last mentioned date was the date when the defendant ought to have, but did not, write to the plaintiff inquiring if he was prepared to wait for the substructure to be completely demolished and a new one meeting design specifications reconstructed *or* if he wished to rescind the contract of sale and purchase and have a refund of the four payments he had made. But, it was not until 16 October 1984 that the defendant took this elementary step (see its letter ex L2 p 1 to encl 5). In these circumstances, the defendant was guilty of inordinate delay and so, to this extent, it was at fault.

I might add, in passing, that it is unnecessary to decide if the defendant had decided to abandon the project but, I note in passing, that in its defence, it had admitted that because of the defective substructure, the project could not be proceeded with and, indeed, to the present day – some nearly five years later – it appeared that no attempt has been made to do so.

I would accordingly, in the exercise of my discretion, award interest at the agreed rate of 8% pa on the aggregate of the four sums aforesaid from 1 July 1983 until date of judgment, and thereafter, pursuant to O 42 r 12 of the Rules of the High Court 1980, at the same rate, until realization.

There will, of course, also be judgment for the plaintiff for the return of the aggregate sums paid under the sale and purchase agreement, amounting to $183,900 and the costs of this application.

Finally, general damages suffered by the plaintiff (if any), as a consequence of the defendant's breach of the sale and purchase agreement, shall be determined by the senior assistant registrar of this court upon enquiry.

Order accordingly.

Solicitors: *Lim Kean Siew & Co*; *Allen & Gledhill.*

Reported by *Prof Ahmad Ibrahim*

Abdul Ghani bin Awang v Sheriliza bte Yusof

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO FS6-2095-87
SITI NORMA YAAKOB J
28 APRIL 1988

Family Law – Custody of infant – Father and mother divorced – Infant staying with mother but maintained by father – Remarriage of mother – Mother intending to take infant to Hungary to live with her husband – Application by father for custody – Whether mother no longer a fit and proper person to have custody of infant in view of her remarriage – Paramount interest of infant

In this case, the applicant and the respondent had a child from their marriage. They were divorced when the infant was two years old and since then the infant had been staying with the respondent but the applicant paid maintenance for the support of the infant. The mother had remarried and intended to take the infant with her to Hungary where her French-born husband was posted. The applicant applied for custody of the infant who had attained 11 years of age. The man the respondent had remarried had been converted to Islam before the marriage.

Held, dismissing the application: (1) The only consideration the court has to bear in mind is whether the respondent is no longer a fit and proper person to have custody of the infant in view of her remarriage and whether custody to the applicant would be for the paramount interest of the infant.

(2) Since the respondent has been taking care of the infant ever since his birth and had uninterrupted custody of him for the past nine years, a change in custody would be too traumatic for the infant.

(3) Bearing all considerations, particularly the infant's wish that he would like to remain with his mother and that both the respondent and her husband were willing to pay for the infant's expenses to come to Malaysia to see the applicant at